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Nos. 99-1426, 99-1431 and 99-1442

# In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
CROSS-PETITIONERS

*v.*

CAROL M. BROWNER, ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

APPALACHIAN POWER COMPANY, ET AL.,
CROSS-PETITIONERS

*v.*

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

CITIZENS FOR BALANCED TRANSPORTATION, ET AL.,
CROSS-PETITIONERS

*v.*

CAROL M. BROWNER, ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

*ON CONDITIONAL CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL CROSS-RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the court of appeals properly reaffirmed the long-standing principle that, in setting and revising National Ambient Air Quality Standards (NAAQS) under Section 109 of the Clean Air Act, the Environmental Protection Agency (EPA) may not consider the costs, technical feasibility, or other alleged effects of implementing measures to attain the NAAQS (Nos. 99-1426 and 99-1431).

2. Whether the court of appeals properly resolved various claims, by postponing decision or rejecting them outright, that EPA's primary and secondary NAAQS for fine particulate matter ($PM_{2.5}$) are inadequate to protect public health and welfare (No. 99-1442).

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# In the Supreme Court of the United States

No. 99-1426

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
CROSS-PETITIONERS

*v.*

CAROL M. BROWNER, ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 99-1431

APPALACHIAN POWER COMPANY, ET AL.,
CROSS-PETITIONERS

*v.*

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL.

No. 99-1442

CITIZENS FOR BALANCED TRANSPORTATION, ET AL.,
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*ON CONDITIONAL CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE FEDERAL CROSS-RESPONDENTS IN OPPOSITION**

## STATEMENT

The federal government's petition for a writ of certiorari (No. 99-1257) seeks review of the court of appeals' ruling that the Environmental Protection Agency (EPA) has interpreted the Clean Air Act (CAA) in a way that effects an unconstitutional delegation of legislative power. 99-1257 Pet. I. The petition also challenges the court of appeals' premature and mistaken ruling limiting how EPA may implement one of the two remanded National Ambient Air Quality Standards (NAAQS) at issue—the ozone NAAQS. *Ibid.* The cross-petitions seek to introduce two sets of unrelated issues involving particular details of the underlying rulemakings.

First, two groups of industrial interests, the American Trucking Associations, *et al.* (ATA), and Appalachian Power Company, *et al.* (APC), ask this Court to review the court of appeals' unanimous statutory ruling that, in setting and revising NAAQS, EPA is precluded from considering the economic costs and effects of implementing those standards. ATA Cross-Pet. i; APC Cross-Pet. i. That ruling reaffirms EPA's 30-year-old construction of the CAA and a series of unanimous judicial decisions stretching over 20 years. See 99-1257 Pet. App. 19a-21a.

Second, a group of environmental interests, Citizens for Balanced Transportation, *et al.* (CBT), seeks review of particular challenges to EPA's selection of the 24-hour primary NAAQS for particulate matter (PM) of 2.5 microns or less ($PM_{2.5}$) and its selection of the secondary NAAQS for $PM_{2.5}$. CBT Cross-Pet. i. The court of appeals concluded that it could not reach most of those issues in light of its remand to the agency. See 99-1257 Pet. App. 4a-5a.

We describe below the court's reasoning on the issues raised by the cross-petitions.

1. The court of appeals' decision in this case addresses a broad range of industry and environmental challenges to EPA's ozone and PM NAAQS. Among other things, the decision reiterates the long settled principle that, "in setting NAAQS under § 109(b) of the Clean Air Act, the EPA is not permitted to consider the cost of implementing those standards." 99-1257 Pet. App. 19a. The court of appeals has consistently held that EPA must set NAAQS based on the "health effects relating to pollutants in the air" and not on alleged costs or other effects that may result from implementation of the NAAQS. *Natural Resources Defense Council, Inc.* v. *EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990) (EPA need not consider alleged health effects associated with unemployment), cert. denied, 498 U.S. 1082 (1991); see also *Lead Indus. Ass'n* v. *EPA*, 647 F.2d 1130, 1148 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980).

The court expressly considered and rejected ATA's and APC's arguments that it should reconsider its decision in *Lead Industries* because that case was decided without the benefit of this Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court explained:

> The *Lead Industries* decision was made in *Chevron* step one terms, * * * as the post-*Chevron* progeny of *Lead Industries* have made clear. [*Natural Resources Defense Council, Inc.* v. *EPA*], 902 F.2d [962,] 973 [(D.C. Cir. 1990), cert. denied, 498 U.S. 1082 (1991)] ("Consideration of costs . . . would be flatly inconsistent with the statute, legislative history and case law on this point"); *NRDC* v. *EPA*,

> 824 F.2d 1146, 1158-59 (D.C. Cir. 1987) (in banc) ("*Vinyl Chloride*") ("[S]tatute on its face does not allow consideration of technological or economic feasibility.").

99-1257 Pet. App. 19a-20a.

The court of appeals additionally considered and rejected the argument that, even if EPA could not consider costs in initially setting NAAQS, it could do so when revising NAAQS. 99-1257 Pet. App. 20a. Finally, the court rejected the industrial groups' argument that Congress's directions to the Clean Air Scientific Advisory Committee (CASAC) to advise EPA on, among other things, "any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance" of NAAQS, CAA, § 109(d)(2)(C)(iv), 42 U.S.C. 7409(d)(2)(C)(iv), signals that EPA should consider those factors in revising NAAQS. 99-1257 Pet. App. 21a. Instead, the CAA directs CASAC to provide that advice in light of EPA's separate duty to give the States information on control strategies. *Ibid.*

2. CBT challenged as arbitrary and capricious EPA's decision not to set a more stringent 24-hour primary NAAQS and more stringent 24-hour and annual secondary NAAQS for $PM_{2.5}$. Because the court of appeals remanded the $PM_{2.5}$ NAAQS on nondelegation grounds, the court of appeals did not rule on CBT's claims except in one narrow respect. 99-1257 Pet. App. 5a, 56a. In the final rule, EPA had announced its decision to address adverse effects that fine PM may have on visibility by establishing secondary $PM_{2.5}$ NAAQS (at the same levels as the primary $PM_{2.5}$ NAAQS) and by implementing the Regional Haze Program described in Section 169A of the CAA, 42 U.S.C 7491. 99-1257

Pet. App. 56a; 62 Fed. Reg. 38,652, 38,683 (1997). The court of appeals rejected CBT's argument that Section 109(b)(2), 42 U.S.C. 7409(b)(2), requires EPA to set secondary NAAQS that will eliminate *all* adverse effects on visibility and deprives EPA of authority to address some impairment of visibility through another program. 99-1257 Pet. App. 57a. The court explained that the CAA included the Regional Haze Program to address adverse effects on visibility that may persist in areas such as national parks "notwithstanding attainment and maintenance of all [NAAQS]." *Ibid.*

3. Neither ATA, APC, nor any other party sought rehearing on the cost issue. CBT filed petitions for rehearing and rehearing en banc as to all of its claims. CBT's petitions were denied without dissent. 99-1257 Pet. App. 71a, 101a.

## ARGUMENT

As our petition for a writ of certiorari explains, the court of appeals has erred in two fundamental respects: (1) it remanded EPA's revised PM and ozone NAAQS based on an aberrant notion of the nondelegation doctrine (99-1257 Pet. 9-10, 11-19); and (2) it prematurely and mistakenly decided how EPA should eventually implement the ozone NAAQS (99-1257 Pet. 19-30). As our reply brief explains, respondents have failed to provide persuasive reasons against review. Instead, they have recharacterized the court of appeals' decision in ways that obfuscate the issues. The cross-petitions at issue here add another layer of complexity and confusion. They raise no issue that would independently warrant review or that would assist the Court in resolving the core nondelegation issue. To the contrary, the cross-petitions would complicate the case with issues that, on the one hand, have long been settled or,

on the other hand, the court of appeals had no occasion to reach.

1. The flaws in the court of appeals' nondelegation analysis are not difficult to discern. This Court has developed the nondelegation doctrine to preserve the Constitution's separation of governmental powers. *E.g.*, *Mistretta* v. *United States*, 488 U.S. 361, 371-372 (1989). It prohibits *Congress* from vesting its legislative power in an executive branch agency. *Ibid.* The court of appeals erred because it misconceived the nondelegation doctrine as a judicial check on agency discretion. See 99-1257 Pet. App. 14a. The court of appeals' decision confuses two distinct lines of inquiry and, in the process, wrongly sets aside legitimate agency action. The Court should therefore correct that fundamental misconception and remand the case to the court of appeals with directions to review the EPA's rules under the correct standard of review. See 99-1257 EPA Reply Br. 2-6.

ATA and APC urge a different course. They argue that the Court should *broaden* the inquiry and use the court of appeals' mistake as a vehicle for setting aside long-settled statutory principles that have guided EPA's implementation of the CAA for 30 years. They specifically challenge the firmly established principle that EPA should set NAAQS based on the public health and welfare effects caused by the pollutant's presence in the ambient air and not on the potential economic costs or other alleged effects of implementing the NAAQS. See ATA Cross-Pet. 14-27; APC Cross-Pet. 14-25. The court of appeals was divided on the nondelegation issue, but it unanimously rejected the industrial groups' arguments on this point and reiterated its past holding that the CAA directs that questions of economic costs and the other effects of implementing

NAAQS can be considered only as part of the implementation process. 99-1257 Pet. App. 19a-21a.

The Court should decline ATA's and APC's invitation to complicate consideration of the nondelegation issue. The court of appeals' decision is correct as to the issue they raise. Moreover, it rests on settled law that has long guided the actions of EPA, Congress, and the courts. Contrary to ATA's urgings, the constitutional question of whether Congress has vested EPA with legislative power is not "tightly intertwined" (ATA Cross-Pet. 7) with the statutory issue of whether Congress directed EPA to set NAAQS based solely on health and welfare effects of ambient pollution concentrations.

a. Congress introduced the NAAQS-based framework through the enactment of the Clean Air Act Amendments of 1970.[1] Since that time, EPA has consistently applied Section 109 according to its terms, which require EPA to set primary NAAQS at levels "requisite to protect the public health." CAA § 109(b)(1), 42 U.S.C. 7409(b)(1). EPA has consistently rejected the notion that, when promulgating NAAQS, it may consider costs, technical feasibility, or related factors.[2] ATA and APC ask this Court to overturn 20

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[1] As this Court has recognized, Congress was dissatisfied with progress under the Air Quality Act of 1967, Pub. L. No. 90-148, § 2, 81 Stat. 485, and enacted the Clean Air Act Amendments of 1970 to make far-reaching changes in the Nation's approach to air pollution control. *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 64 (1975); see *Union Electric Co.* v. *EPA*, 427 U.S. 246, 256-257 (1976).

[2] When promulgating the first NAAQS, Administrator Ruckelshaus announced that no revisions were made to the proposed NAAQS in response to comments questioning the feasibility of their implementation. He stated that the CAA "does not permit

years of court of appeals precedent—decided in the course of reviewing predecessor NAAQS—upholding that interpretation.[3]

As ATA acknowledges (Cross-Pet. 5-6), this Court has repeatedly declined to review the issue that ATA and APC press here.[4] There is no reason to reach a different result now. ATA offers no support for its claim that the court of appeals itself "now lacks confidence" in the holding of *Lead Industries* (Cross-Pet. 17-18). To the contrary, the court of appeals has repeatedly rejected ATA's and APC's principal arguments without a single dissent.[5] The cross-petitions do not raise a controversial issue; the entire District of

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any factors other than health to be taken into account in setting the primary standards." 36 Fed. Reg. 8186 (1971). See also, *e.g.*, 62 Fed. Reg. at 38,683-38,688 (detailed response to comments on this issue in the PM rulemaking).

[3] *American Lung Ass'n* v. *EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998); *Natural Resources Defense Council, Inc.* v. *EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990), cert. denied, 498 U.S. 1082 (1991); *American Petroleum Inst.* v. *Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981), cert. denied, 455 U.S. 1034 (1982); *Lead Indus. Ass'n* v. *EPA*, 647 F.2d 1130, 1148 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980); see also *Natural Resources Defense Council, Inc.* v. *EPA*, 824 F.2d 1146, 1158-1159 (D.C. Cir. 1987) (en banc) (*Vinyl Chloride*).

[4] See Pet. at 8-11, *St. Joe Minerals Corp.* v. *EPA*, cert. denied, 449 U.S. 1042 (1980) (No. 80-483); Pet. at 18-23, *American Petroleum Inst.* v. *Gorsuch*, cert. denied, 455 U.S. 1034 (1982) (No. 80-871).

[5] Since 1980, 15 judges of the District of Columbia Circuit—including Judge Bork writing for the court en banc in *Vinyl Chloride*—have expressed approval of EPA's interpretation. Contrary to APC's assertion (Cross-Pet. 24), nothing in any of the decisions after *Lead Industries* remotely suggests that the court of appeals felt "its hands were tied" by that decision. See cases cited in note 3, *supra*.

Columbia Circuit has long viewed the matter as settled. See 99-1257 Pet. App. 19a. Indeed, if ATA and APC thought otherwise, they should have challenged the panel's unanimous ruling through a petition for rehearing en banc.

The court of appeals and EPA have correctly concluded that Congress "has directly spoken to the precise question at issue." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Section 109(b)(1) of the CAA directs EPA to set primary NAAQS at a level "requisite to protect the public health." See 42 U.S.C. 7409(b)(1). It does not direct EPA to consider economic and other costs when setting NAAQS, and there is no basis for inferring that Congress intended those factors to be considered at that initial stage of the regulatory process. The language and structure of the 1970 CAA demonstrate that the overriding purpose of NAAQS promulgation is to determine, as the first step of the CAA regulatory program, the ambient air quality standards that are necessary to protect the public health and welfare. Neither Section 108, which specifies the kinds of factual information upon which NAAQS must be based, nor Section 109, which contains the legal test NAAQS must meet, discusses or otherwise suggests any consideration of cost or technical feasibility. See *Lead Indus. Ass'n*, 647 F.2d at 1149; *Vinyl Chloride*, 824 F.2d at 1158.[6]

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[6] The States of Ohio, Michigan, and West Virginia suggest in their brief supporting the cross-petitions (Midwest States Br. 9-13) that there is a broader inconsistency in the District of Columbia Circuit's case law with respect to whether administrative agencies ever have authority to consider factors other than those explicitly mentioned in enabling legislation. This alleged conflict goes beyond any question presented in a timely petition or cross-peti-

Section 109(b)(1) specifically requires NAAQS to be "based on" the air quality "criteria" that EPA issues under Section 108. 42 U.S.C. 7409(b)(1). Section 108(a)(2), in turn, limits the kind of information to be included in the "criteria" to "the latest scientific knowledge" about effects on health and welfare "which may be expected from the presence of such pollutant in the ambient air." 42 U.S.C. 7408(a)(2). Section 108(a)(2) makes no mention whatsoever of effects from *implementing* the NAAQS—it mentions only effects resulting from the presence of a criteria pollutant in the air. That silence is telling in light of other sections of the Clean Air Act Amendments of 1970 where Congress expressly provided that EPA should consider costs and similar factors in making decisions.[7]

The structure of the CAA also indicates that EPA should promulgate NAAQS based on health and welfare effects and not on the basis of costs or alleged adverse effects that may result from their implemen-

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tion. Moreover, the question cannot be addressed in such abstract terms, because the answer depends on the purpose and context of a particular statute. The principle of *expressio unius est exclusio alterius* is merely one tool of statutory construction, not a rule of law, see *Shook* v. *District of Columbia Fin. Responsibility & Management Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998); *Longview Fibre Co.* v. *Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992), and therefore its application can be expected to differ from one circumstance to another.

[7] *E.g.*, Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 110(e)(1), 84 Stat. 1682 (authorizing EPA to grant States up to a two-year extension of a NAAQS attainment date if necessary technology is not available); § 111(a)(1), 84 Stat. 1683 (requiring consideration of economic and technological feasibility in establishing standards of performance for new stationary sources); § 231(b), 84 Stat. 1704 (authorizing consideration of economic and technical feasibility in establishing aircraft emission standards).

tation. As this Court recognized long ago, the CAA is a "technology-forcing" statute that sets ambitious goals to protect public health and welfare. See *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 91 (1975). In that respect, Congress has indicated expressly when and to what extent costs and implementation effects shall be considered in the regulatory process. See *Union Elec. Co.* v. *EPA*, 427 U.S. 246 (1976).[8]

For example, States are entitled to develop State Implementation Plans (SIPs) governing how NAAQS will be implemented within their borders. See CAA § 110, 42 U.S.C. 7410. States may properly consider the costs of NAAQS implementation when formulating the SIPs, and EPA may not override those judgments so long as the SIP will achieve attainment of the NAAQS. See *Union Elec. Co.*, 427 U.S. at 256-269.[9] The Court also recognized that the CAA does not allow a State to rely on those considerations at the expense of meeting the statutory deadlines for attaining the national health-based standards. *Id.* at 266-269.[10] The Court's

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[8] See 427 U.S. at 269 ("Technology forcing is a concept somewhat new to our national experience and it necessarily entails certain risks. But Congress considered those risks in passing the 1970 Amendments and decided that the dangers posed by uncontrolled air pollution made them worth taking.").

[9] See, *e.g.*, 427 U.S. at 266 ("Perhaps the most important forum for consideration of claims of economic and technological infeasibility is before the state agency formulating the implementation plan. So long as the national standards are met, the State may select whatever mix of control devices it desires * * * and industries with particular economic or technological problems may seek special treatment in the plan itself.").

[10] See, *e.g.*, 427 U.S. at 268-269 ("In short, the [Clean Air Act Amendments of 1970] offer ample opportunity for consideration of claims of technological and economic infeasibility. Always, how-

longstanding decision in *Union Electric*, describing the CAA as a "technology-forcing" statute and explaining how cost considerations are introduced into the regulatory scheme on a State-by-State basis in the implementation process, would make little sense if EPA had to promulgate NAAQS based on an analysis of costs and related implementation factors at the outset of the regulatory process.[11]

As the court of appeals has repeatedly noted, the legislative history of the 1970 Amendments confirms the paramount importance of setting primary NAAQS based solely on the health effects posed by the pollutant in the ambient air. See *Vinyl Chloride*, 824 F.2d at 1158; *Lead Indus. Ass'n*, 647 F.2d at 1149. For example, the Senate report accompanying the 1970 Amendments states:

> In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The Committee determined that 1) the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and, 2) the growth of pollution load in many

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ever, care is taken that consideration of such claims will not interfere substantially with the primary goal of prompt attainment of the national standards. * * * Congress plainly left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent.").

[11] Section 110 of the 1970 CAA, which was construed by the Court in *Union Electric*, has since undergone considerable revision, but the principles set forth above have not been altered. See *Virginia* v. *EPA*, 108 F.3d 1397, 1407-1409 (D.C. Cir. 1997); 42 U.S.C. 7410(k).

> areas, even with application of available technology, would still be deleterious to public health.
>
> Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down * * *.

S. Rep. No. 1196, 91st Cong., 2d Sess. 2-3 (1970). In other words, the primary NAAQS should be based on health effects rather than economic or technical feasibility, and as a result, the NAAQS have a "technology-forcing" effect. See *Train*, 421 U.S. at 91; *Union Elec. Co.*, 427 U.S. at 257, 269.

At bottom, APC urges this Court to revisit the long-settled question of whether EPA should consider costs and other alleged implementation effects in setting NAAQS because, in APC's view, its preferred approach would be "wise social policy." See, *e.g.*, APC Cross-Pet. 6-7. But Congress concluded otherwise, and Congress's choice was certainly a rational one. Congress reasonably concluded that NAAQS should be based on health and welfare considerations alone so that Congress and the public know that EPA's judgments on the health and welfare threats posed by particular criteria pollutants are not compromised by considerations of economic and technical feasibility. As this Court recognized in *Union Electric*, Congress provided the States with flexibility in the implementation process to consider the economic and technical feasibility of attainment, 427 U.S. at 266-269, but it reserved to itself the prerogative of deciding – as a matter of legislative choice – whether and how to alter the statutory scheme

if public health needs should prove to conflict with an industry's economic viability.[12]

Congress has since recognized and exercised that prerogative. See 62 Fed. Reg. at 38,685. In the course of formulating the Clean Air Act Amendments of 1977, Congress was well aware that some areas of the country had been unable to attain some of the NAAQS. See, *e.g.*, H.R. Rep. No. 294, 95th Cong., 1st Sess. 207-217 (1977). It was also aware that some of the NAAQS criteria pollutants might be non-threshold pollutants and that significant scientific uncertainties are inherent in setting health-based standards. See *id.* at 43-51, 110-112. In response, Congress made significant changes in the provisions for implementing the NAAQS, including, for example, an extension of the deadline for attaining the ozone NAAQS. It also amended Sections 108 and 109 of the Act to require periodic review and revision of NAAQS and to establish CASAC. Nevertheless, Congress did not change the substantive criteria for setting and revising NAAQS. See 62 Fed. Reg. at 38,685 & n.66 (describing the 1977 Amendments).[13]

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[12] See *Lead Indus. Ass'n*, 647 F.2d at 1150 ("if there is a problem with the economic or technological feasibility of the lead standards, * * * any * * * party affected by the standards, must take its case to Congress, the only institution with the authority to remedy the problem"); 99-1257 Pet. App. 68a-69a (Tatel, J., in dissent, noting the role of politically accountable States in implementing NAAQS and the availability of congressional relief).

[13] In addition to requiring CASAC to advise EPA on issuing new or revised criteria and NAAQS, 42 U.S.C. 7409(d)(2)(B), Congress separately charged CASAC with advising EPA on implementation effects, 42 U.S.C. 7409(d)(2)(C). But that does not mean, as APC contends (Cross-Pet. 22), that EPA is to consider these effects in setting or revising NAAQS. See 99-1257 Pet. App. 21a; p. 4, *supra*. The legislative history removes any doubt on that matter. The House Report indicates that Congress did "not intend

Congress exercised that prerogative again in 1990. The Clean Air Act Amendments of 1990 responded to persistent nonattainment problems by adjusting the scheme for their implementation. See, *e.g.*, CAA §§ 181-192, 42 U.S.C. 7511-7514a. Significantly, Congress was fully aware of how NAAQS are promulgated, and it did not change the legal standard on which NAAQS are based. To the contrary, both the House and Senate Reports accompanying the 1990 Amendments expressly reflect the understanding that primary NAAQS are to be "set at a level that 'protects the public health with an adequate margin of safety,' *without regard to the economic or technical feasibility of attainment.*" H.R. Rep. No. 490, 101st Cong., 2d Sess., Pt. 1, at 145 (1990) (emphasis added); accord S. Rep. No. 228, 101st Cong., 1st Sess. 5 (1989). Congress's actions confirm that the court of appeals and EPA have correctly discerned congressional intent to preclude consideration of economic and technical feasibility in setting and revising NAAQS. Cf. *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 600-602 (1983) (Congress "affirmatively manifested its acquiescence" in IRS policy by articulating the policy in committee reports accompanying related legislation); *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 381 (1969) ("the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction").

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this provision to be used as a basis for the Administrator to disapprove any State's plan," but "may be of interest and assistance to the States and to Congress in fashioning future legislation." H.R. Rep. No. 294, *supra*, at 183.

ATA attempts to overcome the overwhelming evidence of congressional intent by drawing analogies from this Court's decision in *Industrial Union Department* v. *American Petroleum Institute.*, 448 U.S. 607 (1980). See ATA Cross-Pet. 15-16. That case, however, involves a different statute, with different language, that creates an entirely different regulatory program. The Occupational Safety and Health Act (OSH Act), 29 U.S.C. 651 *et seq.*, directs the Secretary of Labor to establish "occupational safety and health standard[s]," 29 U.S.C. 655(b), that are directly applicable to industrial employers and that are directly enforced by federal officials. 29 U.S.C. 658-659. The OSH Act *expressly* requires the Secretary to consider whether standards dealing with toxic materials or harmful physical agents are "feasible." 29 U.S.C. 655(b)(5).

The CAA's NAAQS promulgation process, by contrast, is simply the first step in a federal-state regulatory program and does not create standards that are themselves directly applicable to any air pollution source. The CAA directs EPA to set NAAQS at levels of air quality "requisite" to protect public health and welfare, but the CAA empowers the States to determine appropriate emission limitations and other controls on individual air pollution sources. See generally *Train, supra*; *Union Elec. Co., supra.* Unlike the OSH Act scheme, the CAA requires the Administrator to determine, as an initial matter, the exposure limitations necessary to protect health and welfare and leaves to the States discretion to consider—consistent with their obligation to meet the attainment deadlines—the economic or technological feasibility of compliance. See *Union Elec. Co.*, 427 U.S. at 259 (quoting S. Rep. No. 1196, 91st Cong., 2d Sess. 2-3 (1970)).

ATA's and APC's reliance on the court of appeals' en banc decision in *Vinyl Chloride*, 824 F.2d at 1158-1159, is similarly misplaced. See ATA Cross-Pet. 15-18; APC Cross-Pet. 9-10, 19. That decision in no way "strongly suggests" that the District of Columbia Circuit "now lacks confidence" in its *Lead Industries* decision. ATA Cross-Pet. 17-18. To the contrary, the court concluded that EPA should consider economic and technical feasibility when setting individual *emission standards* for specific hazardous air pollutants under Section 112 of the CAA, 42 U.S.C. 7412. It expressly distinguished Section 109's method for promulgating NAAQS. Writing for the en banc court, Judge Bork explained that the language and structure of the CAA support the conclusion that "Congress simply did not intend the economics of pollution control to be considered in [Section 109's] scheme of ambient air regulations." 824 F.2d at 1159.[14]

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[14] We note that EPA attempts to estimate the costs and benefits of implementing NAAQS as part of its Regulatory Impact Analysis (RIA), but it does so only for informational and implementation planning purposes and not as a part of its standard setting process. See 62 Fed. Reg. at 38,702; C.A. App. (PM) 3461-3462. ATA and APC rely selectively on those estimates to create a distorted picture of the potential costs and benefits of the NAAQS in this case. For example, APC and ATA cite EPA's estimate of the cost of fully attaining the revised PM standards ($37 billion) without mentioning EPA's estimate that those standards would produce quantifiable benefits of $20 to $110 billion. Compare APC Cross-Pet. 13 n.23 and ATA Cross-Pet. 4 with C.A. App. (Ozone) 2925. Nor does either mention EPA's estimate that the *net* quantifiable benefits to be derived from only partial attainment of the combination of the revised PM and ozone NAAQS would range from $9.5 to $96 billion. C.A. App. (PM) 3488. Furthermore, it is difficult, if not impossible, for EPA to account for the future development of innovative control technologies when it sets or revises NAAQS. C.A. App. (PM) 3471-3472. Because of the technology-forcing character of the NAAQS, EPA has historically

b. As the foregoing discussion shows, the ATA and APC cross-petitions do not present an issue that would warrant review in its own right: The court of appeals has repeatedly and correctly rejected ATA's and APC's arguments; those rulings have not produced any dissent; this Court has repeatedly declined to review the issue; and ATA and APC did not seek relief from the en banc court before petitioning for a writ of certiorari yet again. ATA nevertheless argues that this Court should combine its review of the nondelegation issue and this particular statutory issue because the issues are "inextricably intertwined." ATA Cross-Pet. 7; see also APC Cross-Pet. 4 (cost issue is "fairly within the scope of the initial petitions"). That assertion is correct only in the haphazard sense that a fishing line might become intertwined with a tree limb. Enlarging the grant would complicate an already complex case and would require the Court to disentangle inquiries that are properly separate and that the court of appeals treated as distinct. Indeed, the court of appeals panel was divided on the nondelegation issue, but unanimous on the supposedly "intertwined" statutory issue that ATA and APC present.

ATA concedes, in response to our petition, that Section 109 of the CAA itself does not violate the nondelegation doctrine. 99-1257 ATA Br. 15 (Section 109 is "undisputedly" constitutional); see also 99-1257 APC Br. 8 ("The court did *not* hold the statute itself unconstitutional."). Significantly, ATA does not contest our showing (99-1257 Pet. 11-16) that the CAA provides EPA with sufficient statutory direction to avoid delegating legislative power. See, *e.g.*, *Mistretta* v.

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*over*estimated the actual cost of their implementation and attainment. See *ibid.*

*United States*, 488 U.S. 361, 372-373 (1989). Instead, ATA defends the court of appeals' decision on the ground that EPA's "interpretation" of the CAA violates the nondelegation doctrine. See 99-1257 ATA Br. 11; 99-1257 APC Br. 10-11, 13; see also 99-1257 Pet. App. 4a ("we find that the construction of the Clean Air Act on which EPA relied in promulgating the NAAQS at issue here effects an unconstitutional delegation of legislative power").

Our petition takes specific issue with that proposition. See 99-1257 Pet. 16. The nondelegation doctrine is a check on Congress's grant of legislative powers and not—as the court of appeals and cross-petitioners would have it—a mechanism for controlling an agency's exercise of discretion. See *ibid.* We are hardly alone in that view. See, *e.g.*, 99-1257 Pet. App. 94a (Silberman, J., dissenting from the denial of rehearing en banc) ("Th[e] purpose [of the nondelegation doctrine] is, of course, to ensure that *Congress* makes the crucial policy choices that are carried into law."); *id.* at 98a (Tatel, J., joined by Edwards, C.J., and Garland, J., dissenting from denial of rehearing en banc) ("For purposes of constitutional analysis, we thus have no need to require that EPA state 'a far more determinate basis for decision' beyond the intelligible principle Congress provided in the Clean Air Act".).

We urge the Court to correct that basic conceptual error and, in accordance with its usual practice, return the case to the court of appeals so that the court can conclude its task of properly evaluating EPA's rulemakings under the statutory arbitrary and capricious standard set out in Section 307(d)(9) of the CAA, 42 U.S.C. 7607(d)(9). The Court has no occasion to venture further by undertaking belatedly to decide anew a

question of statutory construction that the court of appeals and Congress properly settled long ago.

ATA presses the Court to go further based on its inaccurate characterization of what the court of appeals decided. ATA argues that "the court below was forced to consider constitutional nondelegation issues because that court had misconstrued the Clean Air Act in *Lead Industries* and subsequent cases." ATA Cross-Pet. 5. ATA's characterization is fantasy. This case generated six opinions on panel review and petition for rehearing and rehearing en banc, and *not a single judge on the District of Columbia Circuit* expressed ATA's view of the case. Rather, the panel majority and dissenting judges treated the nondelegation issue and ATA's statutory issue as distinct and separate questions.

Specifically, the panel majority declared EPA's actions unconstitutional without reference to *Lead Industries*. 99-1257 Pet. App. 4a. The majority directed EPA "to develop a construction of the act that satisfies this constitutional requirement," *ibid.*, and it offered comment respecting EPA's options on remand, observing that "[c]ost-benefit analysis * * * is not available under decisions of this court," *id.* at 14a-15a. But the panel considered ATA's statutory issue as a separate question, and the panel *unanimously* reaffirmed the correctness of *Lead Industries*, *id.* at 19a-21a. ATA did not challenge the panel's reaffirmation of *Lead Industries* through a petition for rehearing en banc. There is no merit to ATA's assertion that the nondelegation issue and the *Lead Industries* issue are "inextricably intertwined." ATA Cross-Pet. 7.

The fundamental question here remains whether the nondelegation doctrine provides a constitutional limitation on an agency's action. See 99-1257 Pet. App. 4a. If we are correct that the nondelegation doctrine imposes

a separation of powers limitation on Congress – and not a limitation on an agency's exercise of administrative discretion—then this Court should reverse the court of appeals' decision and remand the case to that court to reevaluate EPA's actions under the proper legal standard with the care that befits these important rulemakings. If, to the contrary, the court of appeals correctly applied the nondelegation doctrine, this Court should affirm the court's judgment remanding the cases to EPA so that the agency can "develop a construction of the act that satisfies this constitutional requirement." *Ibid.* In either event, there is no reason for this Court to decide ATA's statutory challenge. The nondelegation ruling and that statutory challenge involve two distinct issues—one controversial and one not. They are related only in the inchoate sense that "everything is related to everything else." *California Div. of Labor Standards Enforcement* v. *Dillingham Const., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring).[15]

2. CBT's challenges to the 24-hour primary NAAQS for $PM_{2.5}$ should be denied because the issues CBT raises were not addressed by the court below. The

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[15] In deference to the Court's certiorari standards, the federal petitioners have limited their petition for a writ of certiorari to the nondelegation and the "Subpart 2" issues. They have not challenged the court of appeals' other adverse rulings, even though those rulings – such as the court's decision that EPA must evaluate the alleged health benefits of smog (99-1257 Pet. App. 44a-49a) – stand on a more dubious footing than the settled question that ATA and APC seek to raise. The federal petitioners, unlike the cross-petitioners here, have limited their petition to issues that have broader importance and independently meet this Court's standards for certiorari. The constitutional and finality issues that the federal petition presents raise fundamental issues that arise in every case in which a court reviews a federal agency's administration of a regulatory program.

court of appeals concluded that its remand of the ozone and $PM_{2.5}$ NAAQS on nondelegation grounds precluded resolution of most of the other challenges before it, including CBT's challenge to the 24-hour $PM_{2.5}$ primary NAAQS. See 99-1257 Pet. App. 4a-5a. There is no warrant for this Court to address an issue that the court of appeals did not reach.[16]

CBT's challenge to the secondary standards for $PM_{2.5}$ should also be denied. The secondary $PM_{2.5}$ NAAQS, like the 24-hour primary $PM_{2.5}$ NAAQS, were remanded to EPA by the court of appeals for reconsideration in light of that court's holding on nondelegation. Thus, the court below did not reach "the main thrust" of CBT's challenge, 99-1257 Pet. App. 56a, and there is no reason

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[16] CBT's challenges are, in any event, without merit. CBT's assertion that the 24-hour $PM_{2.5}$ primary NAAQS is inconsistent with EPA's risk findings rests on a misunderstanding of those findings. In challenging the 24-hour $PM_{2.5}$ primary NAAQS, CBT largely assumes that EPA can address the risk from daily or short-term peak exposures only through a short-term standard. To the contrary, EPA found that it could most effectively reduce the risks from both long-term and peak $PM_{2.5}$ concentrations through an annual standard of 15 $\mu g/m^3$, together with a 24-hour standard to address unusual circumstances. 62 Fed. Reg. at 38,669. The studies on which EPA relied in setting the standard demonstrated a statistically significant correlation between 24-hour $PM_{2.5}$ concentrations and health effects in cities with annual $PM_{2.5}$ concentrations greater than about 16 $\mu g/m^3$, but did not show such a correlation in cities with annual $PM_{2.5}$ concentrations below that level. *Id.* at 38,676. Thus in setting the annual standard just below that level, *i.e.*, at 15 $\mu g/m^3$, EPA has addressed the statistically significant association between health effects and 24-hour $PM_{2.5}$ exposures demonstrated by the studies in the record. *Id.* at 38,669-38,671. The 24-hour $PM_{2.5}$ primary NAAQS (65 $\mu g/m^3$) serves as an additional margin of safety for localized or seasonal exposures that might not be adequately controlled by the annual standard alone. *Id.* at 38,671.

for this Court to address questions that the court of appeals did not decide. The court of appeals did decide one narrow issue that CBT raises here. The court concluded, over CBT's objection, that EPA may take into account the mitigating effect of the Regional Haze Program in setting the secondary $PM_{2.5}$ NAAQS.

The CAA specifically provides that the purpose of the Regional Haze Program is to address adverse visibility impacts that remain "*notwithstanding attainment* and maintenance of all national ambient air quality standards." 42 U.S.C. 7470(1) (emphasis added). That provision makes clear that EPA is not required to set the secondary NAAQS at a level that eliminates *all* adverse effects on visibility. There is no reason for this Court to review the court of appeals' ruling, which is clearly correct. EPA acted within the scope of its authority in relying on the Regional Haze Program to mitigate some of the adverse visibility effects associated with $PM_{2.5}$. 99-1257 Pet. App. 57a.

## CONCLUSION

The conditional cross-petitions for a writ of certiorari should be denied.

Respectfully submitted.

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